MOTION FILED
DEC 24 1981

No. 81-202

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,
v.
CLAIBORNE HARDWARE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ORGANIZATION FOR WOMEN

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December 24, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ORGANIZATION FOR WOMEN FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union ("ACLU") and the National Organization for Women ("NOW") respectfully move for leave to file the attached brief *amici curiae*. The consent of the attorney for the petitioners has been obtained and filed with the Clerk, but respondents have refused consent.

The ACLU was founded over 60 years ago to preserve and protect the fundamental principles of the Bill of Rights. It is a national, non-partisan organization of over 200,000 members. It has frequently appeared in this Court and many other courts, both as representative of parties and as *amici curiae*.

The ACLU's interest in this case stems from the long-standing concern of the organization and of its members

to protect to the fullest extent the rights secured by the First Amendment to the Constitution. The decision of the Supreme Court of Mississippi that is under review here strikes at the very heart of the First Amendment. In subjecting all of the petitioners to liability for damages and to the restraints of an injunction, the decision threatens virtually complete elimination of the right to engage in a time-honored form of expression, the civil rights boycott. Upon many other occasions and in many other cases, the ALCU has acted vigorously to protect those rights and wishes to express its views on the issues to the Court in this *amici* brief.

NOW shares the interests of the ACLU in protecting the right to engage in boycotts to advance civil rights concerns. NOW was the defendant in actions brought by two state attorneys general seeking declaratory and injunctive relief against NOW for its role in promoting the "ERA boycott", under which several hundred church groups, professional associations, women's organizations, and civil rights groups have adopted resolutions not to hold their meetings or conventions in states that have not yet ratified the Equal Rights Amendment. NOW has successfully defended the right to engage in such activity. *Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). NOW is interested in being free to engage in similar activity in the future and thus has a very direct interest in any legal challenge to the ability of a civil rights group to promote boycott activities in furtherance of social justice.

Additionally, *amici* have noted that this case has been set for oral argument in tandem with *General Building Contractors Association* v. *Pennsylvania*, No. 81-280, and related cases, 50 U.S.L.W. 3275 (U.S., Nov. 10, 1981). As the attached brief *amici curiae* demonstrates, there is no relationship between these two cases, and a decision by the Court in favor of petitioners in this case

would not be inconsistent with a decision in favor of the respondents in the *General Building Contractors* case. The petitioners may not address this issue in their brief and accordingly the attached brief *amici curiae* can make a contribution to the Court's decisional process in this case.

Accordingly, the ACLU and NOW move for leave to file the attached brief *amici curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Interest of Amici	1
Statement	1
Summary of Argument	2
Argument	3
I. A Civil Rights Boycott Is At the Core of First Amendment Protection	3
A. A Civil Rights Boycott Is A Form of Political Speech and Association	3
B. Protection of Political Speech and Association Is Central to the First Amendment	7
II. Civil Rights Boycotts Should Not Be Judged as Common Law Conspiracies	9
A. Imposing Liability On An Individual Solely Because of Political Association With Others Violates the First Amendment	12
B. An Injunction That Prohibits Advocacy and Picketing Is An Impermissible Prior Restraint and An Unconstitutionally Overbroad, Content-Based Restriction on Speech	16
C. The *Meadowmoor* Case No Longer Expresses a Constitutionally Viable Principle	19
III. Illegal Conduct By Boycott Participants Can Be Controlled Under Traditional Common-Law Principles of Personal Responsibility Without Employing The Conspiracy Doctrine	22
IV. Limiting the Power of A State To Suppress Civil Rights Boycotts Is Not Inconsistent With the Principle That Federal Civil Rights Laws and Remedies Should Be Broadly Construed	26
Conclusion	29

TABLE OF AUTHORITIES

Cases: Page

Acme Markets, Inc. v. *Retail Store Employees Union Local 692*, 231 F. Supp. 566 (D. Md. 1964) 21
Allee v. *Medrano*, 416 U.S. 802 (1974) 23
AFL v. *Swing*, 312 U.S. 321 (1941) 21
Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 13
Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 16, 27
Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 18
Buckley v. *Valeo*, 424 U.S. 1 (1976) 7
Cafeteria Employees Union Local 302 v. *Angelos*, 320 U.S. 293 (1943) 21
Carey v. *Brown*, 447 U.S. 455 (1980) 7, 17
Carroll v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) 18, 21, 27
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 18
Citizens Against Rent Control v. *City of Berkeley*, 50 U.S.L.W. 4071 (U.S., Dec. 14, 1981) 5, 7
Collin v. *Chicago Park District*, 460 F.2d 746 (7th Cir. 1972) 22
Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530 (1980) 17, 28
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 6, 7, 12
Elfbrandt v. *Russell*, 384 U.S. 11 (1966) 13, 15
Enterprise Window Cleaning Co. v. *Slowuta*, 299 N.Y. 286, 86 N.E. 2d 750 (1949) 21
Garrison v. *Louisiana*, 379 U.S. 64 (1964) 7
General Building Contractors Association v. *Pennsylvania*, No. 81-280 ..... 3, 26, 28
Gertz v. *Welsh*, 418 U.S. 323 (1974) 18
Gomez v. *Toledo*, 446 U.S. 635 (1980) 27
Haddock v. *Stewart*, 232 Md. 139, 192 A.2d 105 (1963) 24
Hague v. *CIO*, 307 U.S. 496 (1939) 23

TABLE OF AUTHORITIES—Continued

Page

Hall v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533 (D. Hawaii 1947) 22
Healy v. *James*, 408 U.S. 169 (1972) 14
Hearn Department Stores, Inc. v. *Livingston*, 282 A.D. 480, 125 N.Y.S.2d 187 (1953) 21
Henry v. *First National Bank*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).. 8, 21
Hickman v. *Taylor*, 170 F.2d 327 (3d Cir. 1948), *cert. denied*, 336 U.S. 906 (1949) 24
International Ass'n of Carpenters of America, Local 213 v. *Sharp*, 202 S.W.2d 506 (Tex. Civ. App. 1947) 21
James v. *Evans*, 149 F. 136 (3d Cir. 1906) 24
Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 14, 15
Krulewitch v. *United States*, 336 U.S. 440 (1949).. 11
Local 858, Hotel Restaurant Employees International Alliance v. *Jiannas*, 211 Ark. 352, 200 S.W.2d 763 (1947) 20
Louisiana v. *United States*, 380 U.S. 145 (1965).. 27
Machesky v. *Bizzell*, 414 F.2d 283 (5th Cir. 1969).. 12, 19, 21
Mason and Dixon Lines, Inc. v. *Odom*, 193 Ga. 471, 18 S.E.2d 841 (1942) 20
Meltex, Inc. v. *Livingston*, 145 N.Y.S.2d 858 (Sup. Ct. 1955) 21
Milk Wagon Drivers Local 753 v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941) 19, 20, 21, 22
Missouri v. *National Organization for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) 4, 6, 12
Missouri Cafeteria, Inc. v. *McVey*, 362 Mo. 583, 242 S.W.2d 549 (1951) 20
Monell v. *New York City Department of Social Services*, 436 U.S. 658 (1978) 23
Moore v. *City Dry Cleaners & Laundry, Inc.*, 41 So. 2d 865 (Fla. 1949) 20
NAACP v. *Alabama*, 357 U.S. 449 (1958) 15

TABLE OF AUTHORITIES—Continued

	Page
NAACP v. *Button*, 371 U.S. 415 (1963)	7, 8, 18, 27
Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976)	16
New York Times v. *Sullivan*, 376 U.S. 254 (1964)	15, 25
New York Times v. *United States*, 403 U.S. 713 (1971) (per curiam)	16
Noto v. *United States*, 367 U.S. 290 (1961)	13
Organization For A Better Austin v. *Keefe*, 402 U.S. 415 (1971)	17
Police Department v. *Mosley*, 408 U.S. 92 (1972)	17
Potter v. *Houston Gulf Coast Building Trades Council*, 482 F.2d 837 (5th Cir. 1973)	22
Rizzo v. *Goode*, 423 U.S. 362 (1976)	23
Rosen v. *North Carolina*, 345 F. Supp. 1364 (W.D. N.C. 1972)	22
Roth v. *United States*, 354 U.S. 476 (1957)	7
Scales v. *United States*, 367 U.S. 203 (1961)	13
Shelton v. *Tucker*, 364 U.S. 479 (1960)	25
Smith v. *F & C Engineering Co.*, 225 Ark. 688, 285 S.W.2d 100 (1956)	21
Smith v. *Grady*, 411 F.2d 181 (5th Cir. 1969)	22
South Shore National Bank v. *Donner*, 104 N.J. Super. 169, 249 A.2d 25 (1969)	24
Southern Christian Leadership Conf. v. *A.G. Corp.*, 241 So.2d 619 (Miss. 1970)	6
Steiner v. *Long Beach Local 128, Oil Workers Int'l Union*, 19 Cal. 2d 676, 123 P.2d 20 (1942)	20
Sullivan v. *Little Hunting Park*, 396 U.S. 229 (1969)	28
Teamsters Local 795 v. *Newell*, 356 U.S. 341 (1958)	21
Thomas v. *Collins*, 323 U.S. 516 (1945)	7
Thornhill v. *Alabama*, 310 U.S. 88 (1940)	15
United Electrical Workers of America v. *Baldwin*, 67 F. Supp. 235 (D. Conn. 1946)	22
United Farm Workers Organizing Comm. v. *La Casita Farms, Inc.*, 439 S.W.2d 398 (Tex. Civ. App. 1968, writ ref'd n.r.e.)	21

TABLE OF AUTHORITIES—Continued

	Page
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966)	9
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965)	12
United States v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973)	14
United States v. *Robel*, 389 U.S. 258 (1967)	13
United States v. *Spock*, 416 F.2d 165 (1st Cir. 1969)	14, 15
Vegelahn v. *Guntner*, 167 Mass. 92, 44 N.E. 1077, 35 L.R.A. 722, 57 Am. St. Rep. 443 (1896)	10
Waldbaum, Inc. v. *United Farm Workers*, 383 N.Y.S.2d 957 (Sup. Ct. 1976)	20
Yates v. *United States*, 354 U.S. 298 (1957)	25
Yellow Cab Co. v. *Production Workers Union*, 92 Ill. App. 3d 355, 416 N.E.2d 48 (1980)	20
Youngdahl v. *Rainfair, Inc.*, 355 U.S. 131 (1957)	21
Constitutions and Statutes:	
U.S. CONST. FIRST AMENDMENT	*passim*
28 U.S.C. § 1257	17
42 U.S.C. § 1981	28
42 U.S.C. § 1983	23
Books and Articles:	
J. BASS, UNLIKELY HEROES (1981)	5
A. BENTLEY, THE PROCESS OF GOVERNMENT (1908)	5
8 HOLDSWORTH, HISTORY OF ENGLISH LAW (2d ed. 1937)	11
C. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS (1977)	3
Note, *The Chilling Effect in Constitutional Law*, 69 COLUM.L. REV. 808 (1969)	15
Note, *The Common-Law and Constitutional Status of Anti-Discrimination Boycotts*, 66 YALE L.J. 397 (1957)	9
Note, 33 TULANE L. REV. 410 (1959)	9

TABLE OF AUTHORITIES—Continued

	Page
Note, *Civil Conspiracy: A Substantive Tort?* 59 B.U.L. REV. 921 (1979)	10
Note, *Civil Conspiracy and Interference With Contractual Relations*, 9 LOYOLA (LA.) L. REV. 302 (1975)	11
P. ODEGARD, PRESSURE POLITICS—THE STORY OF THE ANTI-SALOON LEAGUE (1928)	5
W. PROSSER, TORTS (4th ed. 1971)	24
F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978)	6
R. SALISBURY, INTEREST GROUP POLITICS IN AMERICA (1970)	5
R. Salisbury, "Interest Groups," 4 HANDBOOK OF POLITICAL SCIENCE (Greenstein and Polsby, eds. 1975)	5
Sandifer & Smith, *The Tort Suit For Damages: The New Threat To Civil Rights Organizations*, 41 BROOKLYN L. REV. 559 (1975)	5, 9
Sayre, *Labor and the Courts*, 39 YALE L.J. 682 (1930)	9
Turner, *The Definition of Agreement Under The Sherman Act*, 75 HARV.L. REV. 655 (1962)	12
D. VOGEL, LOBBYING THE CORPORATION; CITIZEN CHALLENGES TO BUSINESS ACTIVITY (1978)	3
S. & B. WEBB, HISTORY OF TRADE UNIONISM (1920)	9
H. ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY (2d ed. 1972)	5
15A C.J.S. *Conspiracy* (1967)	10
16 AM. JUR. 2d *Conspiracy* (1969)	10
RESTATEMENT OF TORTS (2d)	22, 24, 25

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BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ORGANIZATION FOR WOMEN

INTEREST OF AMICI

The interest of *amici* appears in the foregoing motion.

STATEMENT

In 1966, the NAACP and others in Port Gibson, Mississippi, organized a boycott of white merchants to bring public attention to a long series of grievances suffered by black residents of that area and to exert pressure for reform. More than three years later, a group of those merchants brought this action alleging that the boycott was an illegal conspiracy under state law. Evidence showed that, in addition to the usual picketing and other peaceful activity, there had from time to time been acts of violence that coerced some black residents to refrain from doing business with the white merchants. There was no proof that the violence was directed or condoned by the NAACP. The trial court, however, is-

sued a broad injunction not only against further violence but also against all peaceful picketing and advocacy aimed at persuading local residents not to trade at the white-owned shops. The Mississippi Supreme Court affirmed and also held that the NAACP and numerous individuals who had engaged only in peaceful picketing were jointly and severally liable in damages for all losses the plaintiffs incurred because of the boycott, whether or not traceable to violence. App. 1a-35a, 393 So. 2d 1290 (Miss. 1980).[1]

SUMMARY OF ARGUMENT

This case gives the Court an opportunity to declare an important principle of constitutional law: That a civil rights boycott is to be judged, not under standards arising from the law of conspiracy, but instead as activity which lies at the core of the First Amendment's protection of free speech and free association for political ends.

In this brief, *amici* will first define a civil rights boycott—an established and important means of associating for the expression of political viewpoints. We will demonstrate that, like other methods of exercising this fundamental right, civil rights boycotts are essential to self-government in a society in which not all citizens have a high degree of access to the political decision-making process. We will then show that concepts of common law conspiracy can play no role in judging these activities, even when violence occurs, for those concepts not only raise troublesome due process questions but also do not reflect established First Amendment principles. We will show that tort law can be accommodated to those principles through the application of familiar doctrines (other than the law of conspiracy) that have been endorsed by the American Law Institute and that identify the persons who are and should be liable for violent acts. Finally, we will show that the principle we advocate is in

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[1] Citations to "App." are citations to the Appendix to the Petition for Certiorari.

no way disminished or undermined by the very different rule of law, which forms the basis for the lower court decision in *General Building Contractors* v. *Pennsylvania* (No. 81-280), that remedial civil rights laws should be read expensively to accomplish their purpose as effectively as possible.

ARGUMENT

I. A Civil Rights Boycott Is At the Core of First Amendment Protection.

A. *A Civil Rights Boycott Is A Form of Political Speech and Association.*

It is important, at the outset, to define with care what is involved in this case—a civil rights boycott—for a loose definition, especially one drawn from the realm of antitrust, masks the important constitutional issues.

Although sometimes described as a *combination* to withhold a business relationship, a civil rights boycott combines three essential elements: (1) advocacy that (2) persons choose what or where to buy (3) to promote social justice.

Freedom of choice is the governing rule of the marketplace. Ever since colonial times, Americans have exercised this freedom to promote social justice. People vote not only with their ballots but also with their dollars and their personal conduct. *See, e.g.*, C. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 144 (1977).

It is just such reasons that led colonial merchants to boycott English goods until the Stamp and Townsend Acts were repealed. In modern times people have refused to ride buses in Montgomery, Alabama, as a protest against racial discrimination; refused to buy table grapes or lettuce, or Farah slacks, or J.P. Stevens branded linens, out of sympathy with workers seeking fair treatment; refused to buy Saran Wrap made by a company that also manufactured napalm;[2] and refused to attend meetings

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[2] *See* D. VOGEL, LOBBYING THE CORPORATION; CITIZEN CHALLENGES TO BUSINESS ACTIVITY 43-46 (1978).

or conventions held in states that have not ratified the Equal Rights Amendment.[3] Religious groups today urge Americans to refuse to purchase goods advertised on television programs which feature sex and violence. The list is nearly endless.

Some of these activities occur at a single point in time and place; others are spread over large areas and many months or years. Sometimes the participants are constant and well defined, but often the composition of the group fluctuates as new adherents join while others lose interest.

As with ballots and other forms of political expression, these plainly lawful activities are more effective when they are the acts of many rather than the few. Here advocacy enters. Civil rights boycotts are sometimes wholly spontaneous. More often they are stimulated by an advocate who makes the point that large-scale refusals to buy or travel can communicate a political message. And if the boycott attracts large numbers of participants, the reason lies in their sympathy with the message and with their determination, often at considerable personal inconvenience, to demonstrate the depth of their support. Thus it is not "conspiracy", in any familiar meaning of the offensive term, but shared political beliefs that bring together the participants in a civil rights boycott. As the Court said just the other day:

> "We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th Century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad com-

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[3] This was the "ERA Boycott" which was unsuccessfully attacked in Missouri v. National Org. for Women, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

munity and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control* v. *City of Berkeley*, 50 U.S.L.W. 4071, 4072 (U.S., Dec. 14, 1981).

The importance of the civil rights boycott as a form of political association and expression arises from the nature of the politicial process itself. It has long been recognized that many government decisions result from the interaction of various "interest groups."[4] An interest group may be defined as any group with a shared political belief or goal. The group may be relatively permanent, like the National Association of Manufacturers or the National Council of Churches, or it may be transitory, such as when several different groups form a temporary coalition around a specific issue.[5]

A boycott can be an effective tool for communicating the group's message. It has special value to groups that do not have a high degree of access to the decision-making process (and blacks in Mississippi in 1966 certainly fit that description[6]). It also has special value when a group is

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[4] *See, e.g.*, A. BENTLEY, THE PROCESS OF GOVERNMENT (1908); P. ODEGARD, PRESSURE POLITICS—THE STORY OF THE ANTI-SALOON LEAGUE (1928); H. ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY (2d ed. 1972); R. SALISBURY, INTEREST GROUP POLITICS IN AMERICA (1970); R. Salisbury, "Interest Groups," 4 HANDBOOK OF POLITICAL SCIENCE (Greenstein and Polsby, eds. 1975).

[5] Interest groups are sometimes referred to disparagingly as "special interest groups," *see, e.g., Citizens Against Rent Control* v. *City of Berkeley, supra*, 50 U.S.L.W. at 4072, but such labels are of no assistance in understanding or analyzing the pertinent issues.

[6] "In the mid-60's, Port Gibson (as well as the whole State of Mississippi) represented a classic case of segregation and discrimination." Sandifer & Smith, *The Tort Suit for Damages: The New Threat To Civil Rights Organizations*, 41 BROOKLYN L. REV. 559-60 (1975). *See* J. BASS, UNLIKELY HEROES, 172-200 (1981); F.

seeking to change the status quo, which both inertia and entrenched interests will tend to maintain. Further, a boycott conveys a particular kind of political message: that a significant number of persons feel frustrated by their lack of political access and feel strongly enough about their goal to change their buying patterns, perhaps at some cost and inconvenience, such as by driving to the next county for groceries and other necessities. This is an important message, for the law-maker gives consideration not only to technical arguments for or against a proposed measure but also to the depth of support or opposition it enjoys.[7]

READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 195-248, 353-371 (1978).

[7] Some civil rights boycotts are labelled as "secondary" boycotts, implying that they aim at merchants who have no power to meet the boycotters' demands and thus avoid economic harm. *See, e.g.*, App. 44b-51b; App. 19a, 393 So. 2d at 1299; Southern Christian Leadership Conf. v. A.G. Corp., 241 So. 2d 619, 624 (Miss. 1970); *Missouri* v. *National Org. for Women, supra*, 620 F.2d at 1312. This approach misses the point (and the court below did not view the label as significant in this case). The objective of a civil rights boycott like the one in Port Gibson is often to protest a discriminatory system, composed of both political and economic elements. (Of course the objective may be to protest unfair practices of the merchants themselves, in which case the merchants are precisely the ones who can respond to the demands.) Moreover, it is often the case that the merchants whose trade is shunned are influential members, not to mention beneficiaries, of the political structure about which the boycotters are complaining. Finally, one objective of a boycott is to draw attention to the conditions about which the boycotters are complaining, and as this Court has said:

> "It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns."

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 143-44 (1961), quoted in *Missouri* v. *National Org. for Women, supra*, 620 F.2d at 1315 (footnote omitted).

Thus, it can readily be seen that a civil rights boycott is the very essence of expression and association for political ends.

B. *Protection of Political Speech and Association Is Central to the First Amendment.*

This Court has long held that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). Political expression makes possible an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

> "The Court has long viewed the First Amendment as protecting a market place for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control* v. *City of Berkley, supra*, 50 U.S.L.W. at 4072.

And because the First Amendment serves as a "charter for government" and not merely as "an institution for learning," the protection of the First Amendment is nowhere more necessary than with respect to speech that promotes political action. *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945); *see NAACP* v. *Button*, 371 U.S. 415, 429 (1963).

The Court has also recognized that political expression covers a broad range of actions and thus has granted First Amendment protection to such diverse activities as expenditures in support of political issues or candidates, *Citizens Against Rent Control* v. *City of Berkeley, supra*, and *Buckley* v. *Valeo*, 424 U.S. 1 (1976); union organizing, *Thomas* v. *Collins*, 323 U.S. 516 (1945); advertising and lobbying campaigns in support of legislation, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); litigation, *NAACP* v. *Button, supra*, and picketing, *Carey* v. *Brown*, 447 U.S. 455 (1980). In *Carey*,

the Court held that public protests over "important economic, social, and political subjects" such as the racial segregation involved in the case before it reflect " 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' " which have *"always rested on the highest rung of the hierarchy of First Amendment values . . . ."* 447 U.S. at 466-67 (emphasis supplied). And in *NAACP* v. *Button*, *supra*, in striking down a statute construed to prohibit the NAACP from encouraging and supporting litigation to challenge racial discrimination, the Court said:

> "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . For such a group, association for litigation may be the most effective form of political association." 371 U.S. at 429, 431.

There can be no doubt that it is just such political expression that is under challenge here. Although civil rights boycotts, like civil rights picketing or litigation, involve conduct, their essence is speech and association to promote social justice: advocating that others associate in a common refusal to deal with particular products, individuals, or organizations in order to achieve racial equality. The purpose of the boycott activities enjoined by the Mississippi state courts, for example, was "to protest racial discrimination by the merchants and city government of Port Gibson." *Henry* v. *First National Bank*, 595 F.2d 291, 302 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). As such the boycott follows in a long tradition of group protest activities aimed at achieving fundamental political reforms, which represent "essential political speech lying at the core of the First Amendment." *Id.* at 303.[8]

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[8] The Fifth Circuit's holding in *Henry* that the Port Gibson boycott is protected by the First Amendment was the basis for its decision that petitioners could appeal within the state court system without posting bond. In view of the importance of First Amendment principles to the proper resolution of this case, it is

II. Civil Rights Boycotts Should Not Be Judged As Common Law Conspiracies.

> "The tort of 'conspiracy' is poorly defined, and highly susceptible to judicial expansion; its relatively brief history is colored by use as a weapon against the developing labor movement."

So said this Court fifteen years ago in reversing a damages award against the United Mine Workers that was in part based upon an alleged "unlawful conspiracy and an unlawful boycott . . . to maliciously, wantonly and willfully interfere with [plaintiffs'] contract of employment and with his contract of haulage" and upon proof that two days of localized violence marked the beginning of a nine-month period of peaceful picketing at a mine. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 718-19, 732-33 (1966).[9]

The type of "conspiracy" involved in *Gibbs* and in this case was *not* an agreement to accomplish an *unlawful objective*. In both cases, the objectives of the agreement were entirely lawful. What triggered state-court intervention was the *unlawful means* that some persons had employed to further the common—and lawful—objective. Notably, to impose liability the unlawful means need not have been part of the agreed plan to accomplish the

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astonishing that the Supreme Court of Mississippi refers to *Henry* only in its description of the proceedings to date and makes no reference to the Fifth Circuit's constitutional holding.

[9] The Court's reference to the tort having been invoked to combat the labor movement is of course entirely accurate. *See* S. & B. WEBB, HISTORY OF TRADE UNIONISM 597-98 (1920); Note, 33 TULANE L. REV. 410, 411 (1959); Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 686-87 (1930).

In more recent times the same or a similar theory has been employed to suppress civil rights boycotts. Sandifer & Smith, *The Tort Suit For Damages: The New Threat To Civil Rights Organizations*, 41 BROOKLYN L. REV. 559, 561-64 (1975); Note, *The Common-Law and Constitutional Status of Anti-Discrimination Boycotts*, 66 YALE L.J. 397, 397-98 (1957).

objective; it is enough that at some point in carrying out the agreed plan some member of the group decides to employ unlawful activity to further the objectives of the plan. App. 23a, 393 So. 2d at 1301; *see* 16 AM. JUR. 2d *Conspiracy*, § 49, p. 267 (1969); 15A C.J.S. *Conspiracy*, §§ 1(1), 4 (1967). Indeed, in several states the unlawful means need not be unlawful standing alone but instead may consist of acts that would be entirely lawful if committed by a single individual.[10] Note, *Civil Conspiracy: A Substantive Tort?*, 59 B.U.L. REV. 921, 926 (1979). Once there is proof of the agreement and the use of "unlawful" means, all members of the "conspiracy"—whether or not they participated in the unlawful activity, condoned it or even knew about it—are jointly and severally liable for all injuries caused, even those that result from lawful activity engaged in by the "conspiracy." 15A C.J.S. *Conspiracy*, § 18, pp. 656-58. As this Court said in *Gibbs*:

> "Under the state law, it would not have been relevant that the union had not actually authorized, participated in or ratified the particular violence or even the general use of violence. It would only be necessary to show a conspiracy in which the union had a part, and to show also that those who engaged in the violence were members of the conspiracy and their

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[10] Mr. Justice Holmes, as a member of the Supreme Judicial Court of Massachusetts, expressed strong objections to this notion in his famous dissent in Vegelahn v. Guntner, 167 Mass. 92, 107-08, 44 N.E. 1077, 1081, 35 L.R.A. 722, 727, 57 Am. St. Rep. 443, 448 (1896), when he said:

> "But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle."

acts were related to the conspiracy's purpose." 383 U.S. at 733.[11]

Thus, virtually any kind of group activity could be labelled as a common-law conspiracy if any member of the group commits an "unlawful" act in furtherance of the group's purpose. As Mr. Justice Jackson warned, in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 446 (1949), the law of criminal conspiracy represents "a serious threat to fairness in our administration of justice." He called the crime of conspiracy "so vague that it almost defies definition." He continued:

> "[E]ven when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." 336 U.S. at 449.[12]

Moreover, a conspiracy can be proved "by evidence that is admissible only upon assumption that conspiracy existed." 336 U.S. at 453.

When the conspiracy doctrine is applied to the law of restraint of trade, there are strong policy considerations which may overcome these due process obstacles. The operative principle for business is that competitors are supposed to compete, not collaborate, and to advance their individual profit-seeking objectives. The law appropri-

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[11] "By pleading conspiracy, the plaintiff implicates each defendant who merely participates in the common design. The act or declaration of one defendant in carrying out the wrong is the act or declaration of all, and thus persons who merely agree to the plan or design may be held liable for the acts of others even if they in fact commit no overt act, and gain no benefit therefrom." Note, *Civil Conspiracy and Interference With Contractual Relations*, 9 LOYOLA (La.) L. REV. 302, 310-11 (1975).

[12] "The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the court of Star Chamber," which flourished in England in the 17th Century. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 379 (2d ed. 1937).

ately intervenes when that important principle is not followed. Indeed, the existence of a conspiracy may more easily be proved under the antitrust laws than in other areas simply because business actions that are not consistent with the actors' objectives as competitors produce a strong inference of conspiratorial behavior. *See e.g.*, Turner, *The Definition of Agreement Under the Sherman Act*, 75 HARV. L.REV. 655, 658-59 (1962).

Application of the conspiracy doctrine to suppress a civil rights boycott, however, cannot proceed on any such principle.[13] There is no policy that favors competition in pursuit of civil rights; to the contrary, collaboration is not only permitted but is encouraged and protected—by the First Amendment. As we have shown, a civil rights boycott is a quintessential exercise of the right to associate and to speak on matters of public importance. Judging such activities as conspiracies at common law not only raises serious due process concerns but also results in (1) imposing tort liability on individuals solely because of their politcial associations and (2) injunctions that are overbroad, content-based, prior restraints on speech.

A. *Imposing Liability On An Individual Solely Because of Political Association With Others Violates the First Amendment.*

In a long line of cases concerning actions against those associated with political organizations, this Court has consistently held that mere association with the organization cannot be the basis of criminal sanction or other adverse action by the government, *even where, unlike here, the organization has unlawful aims.*

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[13] The court below acknowledged that civil rights activity may not be judged under restraint-of-trade principles, citing United Mine Workers v. Pennington, 381 U.S. 657 (1965), Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), Missouri v. National Org. for Women, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), and Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969). App. 22a, 393 So. 2d at 1301.

The principle was first clearly established in *Scales* v. *United States*, 367 U.S. 203 (1961), and *Noto* v. *United States*, 367 U.S. 290 (1961), involving criminal prosecutions for membership in the Communist Party under the Smith Act. Recognizing that the Communist Party had both legal and illegal aims, the Court in those cases held that proof of (1) the organization's illegal aims and (2) the individual's knowledge of and specific intent to further those aims, were necessary for conviction under the Act.[14] And whether the defendants had the requisite illegal intent

> "must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto* v. *United States*, *supra*, 367 U.S. at 299-300.

The Court has adhered to this rigorous two-part test again and again in striking down statutes and rules because they unnecessarily infringed First and Fifth Amendment rights. *See, e.g., Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964) (invalidating a regulation denying passports because of membership in a "subversive" organization as violating the Fifth Amendment right to travel and the First Amendment rights to speak and associate freely where there was no showing of specific intent to further unlawful aims of organization); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966) (striking down a statutorily required oath binding state employees not to become members of the Communist Party, again where there was no showing of specific intent to further illegal action); *United States* v. *Robel*, 389 U.S. 258 (1967)

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[14] Because the Court in *Scales* construed the Smith Act as requiring these showings, it found that the Act passed muster under the First and Fifth Amendments. 367 U.S. at 224-30.

(holding unconstitutional a statute declaring it illegal for any member of a Communist organization to be employed at a defense facility). The same test has been applied to reverse conspiracy convictions based on the defendants' association with a group that urged burning of draft cards to protest the Vietnam war, *United States* v. *Spock*, 416 F.2d 165, 172-73 (1st Cir. 1969), and based on association with organizers of protest activities at the time of the 1968 Democratic convention in Chicago, *United States* v. *Dellinger*, 472 F.2d 340, 392-93 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

The Court has not limited the application of this strict two-part test to criminal cases. In *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607-09 (1967), the Court declared unconstitutional a state law that disqualified from state employment any person who was a member of a group that advocated the unlawful overthrow of the government and that also required teachers, on pain of dismissal, to pledge that they would never become members of the Communist Party. More recently, in *Healy* v. *James*, 408 U.S. 169 (1972), the Court held that a state college's denial of recognition to a student political organization violated the students' First Amendment freedom of association. At issue, *inter alia*, was whether the assertedly violent and illegal goals of the national organization of Students for a Democratic Society could be imputed to the local chapter. The Court, noting that it "has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization," found that the State had failed to meet its "burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent [by the local chapter] to further those illegal aims." 408 U.S. at 185-86.

These cases all point to the conclusion that Government may not, through statutes, regulations, or court orders, penalize an individual for unlawful acts com-

mitted in furtherance of lawful political objectives merely because of the individual's association with those objectives.[15] A fundamental reason is that, where political association protected by the First Amendment is involved, any broader standard of liability can make persons wary of engaging in lawful political activity. *Keyishian* v. *Board of Regents*, *supra*, 385 U.S. at 604 ("[t]he danger of that chilling effect upon the exercise of First Amendment rights must be guarded against by sensitive tools"); *Elfbrandt* v. *Russell*, *supra*, 384 U.S. at 18 ("public employees of character and integrity [required to take oath] may well forgo their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom"); *see also NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958) (compelled disclosure of membership list "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure"; *United States* v. *Spock*, *supra*, 416 F.2d at 188 (Coffin, J., dissenting in part); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).[16]

For this reason alone, the no-fault liability imposed upon participants in a civil rights boycott—which has only lawful aims—through application of the common law conspiracy doctrine cannot withstand constitutional scrutiny.

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[15] Although the injunction and damages award against petitioners in this case were entered in a private action, the First Amendment principles discussed in the text apply with full force. *See* New York Times v. Sullivan, 376 U.S. 254, 265 (1964).

[16] So important is the need to avoid chilling protected activity that a person whose own activity could lawfully be proscribed by a narrowly drawn statute may nevertheless challenge the constitutionality of a broadly drawn statute "on its face," *i.e.*, because the statute violates the First Amendment rights of others. *E.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

B. *An Injunction That Prohibits Advocacy and Picketing Is An Impermissible Prior Restraint and An Unconstitutionally Overbroad, Content-Based Restriction on Speech.*

In addition to holding petitioners herein jointly and severally liable for all damages incurred by the merchants as a result of the boycott, the Mississippi Supreme Court upheld in every respect the lower court's injunction prohibiting all further boycott activity, peaceful or otherwise. As is typical in such cases, the injunction prohibited "the defendants and all persons confederating with them" from undertaking a wide array of boycott-related activities, including:

> "2. Persuading, soliciting, advising . . . any person to withdraw and withhold his or her patronage or to cease trading with the above-named complainants."
>
> and
>
> "6. Picketing or patrolling the premises of any of the above-named complainants . . . ." (App. 19g)

It is a long-established principle that any prior restraint on expression bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). The Court has consistently applied this policy to prior judicial restraints. Thus, in *New York Times* v. *United States*, 403 U.S. 713 (1971) (per curiam), the Court held that the United States could not obtain injunctions against publication of the Pentagon Papers by the New York *Times* and the Washington *Post*. Similarly, in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), the Court lifted a "fair trial gag order" imposed by a state court judge, stating (per Chief Justice Burger):

> "The thread running through all these [cited] cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." 427 U.S. at 559.

And in *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the heavy presumption against prior restraints was invoked by this Court in vacating a state court injunction prohibiting picketing and distribution of leaflets.[17]

It necessarily follows that injunctions against civil rights boycotts, such as the injunction issued in this case, are presumed invalid. But there is no need to rely on presumptions, for injunctions like these contain two fundamental infirmities.

One is the unjustified restriction of speech based solely on the content of the message. The injunction *prohibits* all picketing of respondents' premises, and all "persuading, soliciting, advising" anyone to cease trading with respondents, although those activities had only a civil rights purpose.

It is clear that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . ." *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972).[18] *See also Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 537 (1980); *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980). An injunction or other government action may regulate the time, place or manner of the persuasion and advice to which it is addressed. 447 U.S. at 535-36. The injunction involved here, however, does not even pretend to be a regulation of time, place and manner. Instead,

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[17] Although the injunction at issue was termed "temporary" by the state court, it had already been in effect for over three years by the time of this Court's decision, and the Court made clear, in deciding that it had jurisdiction under 28 U.S.C. § 1257, that the lower court would likely issue a permanent injunction after a full trial through application of the same standards employed in issuing the injunction under review.

[18] In *Mosley*, the Court invalidated an ordinance that prohibited picketing in the vicinity of a school but allowed labor union picketing of a school that was involved in a labor dispute. It was therefore not content-neutral.

it forbids altogether the communication of a particular message. Moreover, the content of that message did not constitute a clear and present danger to the public order, a defamatory falsehood, or any of the other narrowly defined content categories which may permissibly be regulated.[19] Rather, as we have shown above, the message the civil rights boycotters sought to convey is essential political speech that lies at the core of the First Amendment.

The second fundamental infirmity in injunctions like these is their violation of the principle that, when statutes or other government action intrudes into the area of First Amendment freedoms, "[p]recision of regulation" is required to ensure that constitutionally protected liberties are not stifled. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). The Court stated in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968):

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end, can be more narrowly achieved.' [Citation omitted] In other words, the order must be tailored as precisely as possible to the exact needs of the case."

An injunction based upon the common-law conspiracy doctrine, like the one issued in this case, is bound to regulate the content of protected speech in an overbroad manner, for that doctrine sweeps within it all persons who have actively supported the lawful aims of the "con-

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[19] *See e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (advocacy directed to and likely to invite or produce imminent lawless action); Gertz v. Welsh, 418 U.S. 323 (1974) (defamation); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

spiracy" and makes the entire "conspiracy" subject to judicial prohibition.

On facts remarkably similar to those of this case, the Fifth Circuit in *Machesky* v. *Bizzell*, 414 F.2d 283 (5th Cir. 1969), struck down a Mississippi state court injunction prohibiting peaceful picketing and other boycott activity directed against white merchants in a small Mississippi town by blacks protesting racial discrimination. The boycott at issue had been accompanied by sporadic violence, including threats against customers patronizing the white merchants' stores. In addition to enjoining force or violence, the state court enjoined peaceful picketing and loitering or congregating to induce, persuade or coerce persons not to do business with the complaining merchants. Noting that the injunction at issue prohibited not only "protected picketing" but "even speech directed toward the boycott effort," the Fifth Circuit stated:

> "We hold that the state court injunction here is constitutionally overbroad in that it lumps the protected with the unprotected in such a way as to abridge important public interests in the full dissemination of public expression on public issues." 414 F.2d at 291.

It follows that a broad injunction against a civil rights boycott cannot be sustained, for it contravenes fundamental constitutional principles rooted firmly in the First Amendment.

C. *The* Meadowmoor *Case No Longer Expresses a Constitutionally Viable Principle.*

The Mississippi Supreme Court purports to rely upon *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), in imposing sweeping liability upon a large group of defendants who had no personal involvement in any illegal activity. In *Meadowmoor*, the Court held that a labor union *and each of its six thousand members* were properly named defendants in an action alleging common law conspiracy, and, because a number of the defendants had engaged in vio-

lence, all of them could be subjected to a sweeping injunction not only against violence but also against peaceful picketing.

There are two problems with relying on *Meadowmoor* to support the decision below.

First, it was decided before the Court had developed the First Amendment principles on which we and the petitioners rely. The Court's holding is, as we urge here, inconsistent with fundamental constitutional principles.[20]

Second, the decision has had unfortunate consequences because of its vagueness: It authorizes an injunction barring peaceful picketing and other protected forms of expression if there has in some ill-defined sense been "enough" violence that can be linked to the protected activity. Although a number of state courts have distinguished *Meadowmoor* on its facts and rightly permitted the exercise of free expression to continue,[21] other state courts, citing *Meadowmoor*, have relied upon minimal evidence of unlawful conduct as a basis for enjoining the peaceful exercise of constitutional rights, and they have done so under an ill-defined conspiracy theory[22]

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[20] *Meadowmoor* has been cited in over 250 reported federal and state decisions, but until this case none of these decisions (except those later reversed) had ever enjoined peaceful boycotts, demonstrations or picketing because of related violence except in the context of labor union activity.

[21] *See, e.g.*, Mason and Dixon Lines, Inc. v. Odom, 193 Ga. 471, 18 S.E.2d 841 (1942) (violence not sufficient to make future peaceful picketing coercive); Yellow Cab Co. v. Production Workers Union, 92 Ill. App. 3d 355, 416 N.E.2d 48 (1980) (violence not shown to be enmeshed with picketing); Missouri Cafeteria, Inc. v. McVey, 362 Mo. 583, 242 S.W.2d 549 (1951) (violence not sufficient to justify injunction against picketing); Waldbaum, Inc. v. United Farm Workers, 383 N.Y.S.2d 957 (Sup. Ct. 1976) (violence does not meet *Meadowmoor* standard).

[22] *See, e.g.*, Local 858, Hotel Restaurant Employees International Alliance v. Jiannas, 211 Ark. 352, 200 S.W.2d 763 (1947); Steiner v. Long Beach Local 128, Oil Workers Int'l Union, 19 Cal. 2d 676, 123 P.2d 20 (1942); Moore v. City Dry Cleaners & Laundry, Inc., 41 So. 2d 865 (Fla. 1949).

or without clearly articulating any liability theory at all.[23] By contrast, no reported Federal decision since *Meadowmoor* has ever invoked that decision's seeming support for injunctions against the peaceful exercise of constitutional rights because of related violence, and the federal judiciary has repeatedly overturned or limited state court injunctions against peaceful picketing, boycotts, or demonstrations.[24]

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[23] Smith v. F & C Engineering Co., 225 Ark. 688, 285 S.W.2d 100 (1956); Enterprise Window Cleaning Co. v. Slowuta, 299 N.Y. 286, 86 N.E.2d 750 (1949) (court refused to modify injunction against picketing entered by consent although there had been no violence for 10 years); Hearn Department Stores, Inc. v. Livingston, 282 A.D. 480, 125 N.Y.S.2d 187 (1953); Meltex, Inc. v. Livingston, 145 N.Y.S.2d 858 (Sup. Ct. 1955); United Farm Workers Organizing Comm. v. La Casita Farms, Inc., 439 S.W.2d 398 (Tex. Civ. App. 1968, writ ref'd n.r.e.); International Ass'n of Carpenters of America, Local 213 v. Sharp, 202 S.W.2d 506 (Tex. Civ. App. 1947).

[24] Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) (state court injunction against rallies issued in reliance upon *Meadowmoor* reversed); Teamsters Local 795 v. Newell, 356 U.S. 341 (1958) (state court injunction against picketing and boycotts issued in reliance upon *Meadowmoor* reversed *per curiam*); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (state court injunction against picketing reversed; *Meadowmoor* distinguished); Cafeteria Employees Union Local 302 v. Angelos, 320 U.S. 293 (1943) (state court injunction against picketing reversed; *Meadowmoor* distinguished); AFL v. Swing, 312 U.S. 321 (1941) (state court injunction against picketing reversed; *Meadowmoor* distinguished); Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (enforcement of state court injunction against all picketing and boycotting enjoined; *Meadowmoor* distinguished); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969) (enforcement of state court injunction against civil rights boycott enjoined; *Meadowmoor* distinguished); Acme Markets, Inc. v. Retail Store Employees Union Local 692, 231 F. Supp. 566 (D. Md. 1964) (enforcement of state court temporary restraining order against all picketing limited to acts enjoined in *Youngdahl*); *see also*

Meadowmoor no longer reflects current interpretation of the protection to be afforded First Amendment rights, and we urge that it be overruled.

III. Illegal Conduct By Boycott Participants Can Be Controlled Under Traditional Common-Law Principles of Personal Responsibility Without Employing The Conspiracy Doctrine.

We have shown that even if some members of a group engage in violence, so long as violence is not a planned objective or tactic, a civil rights boycott is the kind of activity that is not merely lawful but is—indeed is the essence of—the freedom of association and speech which the First Amendment protects. We have also shown that application of the common-law conspiracy doctrine to civil rights boycotts raises serious due process objections. Therefore, the boycott itself cannot be made unlawful.

There remains an important question: How may a court, without treading on constitutional rights, control and provide redress for violence or similar illegal conduct when it occurs in connection with a civil rights boycott?

The answer lies in traditional common-law principles that govern responsibility of one person for torts that are committed by another.

Section 876 of the Restatement of Torts (Second) describes the situations in which one person is subject to

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Potter v. Houston Gulf Coast Building Trades Council, 482 F.2d 837 (5th Cir. 1973); Collin v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972) (governmental body ordered to grant permit for demonstration; *Meadowmoor* distinguished); Smith v. Grady, 411 F.2d 181 (5th Cir. 1969) (federal district court injunction against verbal communications during civil rights boycott modified); Rosen v. North Carolina, 345 F. Supp. 1364 (W.D.N.C. 1972); Hall v. Hawaiian Pineapple Co., 72 F. Supp. 533 (D. Hawaii 1947); United Electrical Workers of America v. Baldwin, 67 F. Supp. 235 (D. Conn. 1946) (state court injunction against picketing unconstitutionally overbroad).

liability for harm caused by another person with whom the first person is "acting in concert." [25] In none of these situations is a person subject to liability if his only relationship to the tort is that he joined in a common plan to carry out a lawful objective but another member engaged in tortious conduct in furtherance of the plan.[26]

One situation is when the first person "does a tortious act in concert with the other or pursuant to a common

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[25] "876. Persons Acting in Concert

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

[26] *Cf.* Rizzo v. Goode, 423 U.S. 362, 373-76 (1976), where the Court reversed an injunction under 42 U.S.C. § 1983 against police officials that would have required them to restrain tortious police conduct, on the ground that such collective civil responsibility should be limited to concerted designs to accomplish a wrongful objective. The Court distinguished the injunction in Hague v. CIO, 307 U.S. 496 (1939), as grounded on "the adoption and enforcement of deliberate policies" by the Mayor and city officials to forbid communication regarding federal labor statutes, and distinguished the injunction in Allee v. Medrano, 416 U.S. 802 (1974), on the ground that the injunction in that case against the named Texas Rangers "flowed from an intentional, concerted, and indeed conspirational effort to deprive the organizers of their First Amendment rights . . . ." 423 U.S. at 374-75. *Cf.* Monell v. New York City Department of Social Services, 436 U.S. 658, 692 (1978) (municipality not liable under Section 1983 for the torts of its employees).

design with him . . . ." Sec. 876(a). When the word "conspiracy" is used in this context, it means a common plan to engage in tortious conduct or to achieve an unlawful objective. Comment *b*. Under this concept, labelling as a "conspiracy" a common plan to achieve a lawful objective would not support the imposition of liability on all members; one alleged "co-conspirator" could thus be liable for tortious acts committed in furtherance of the common plan while none other would be. *E.g.*, *James* v. *Evans*, 149 F. 136 (3d Cir. 1906), cited for this proposition in W. PROSSER, TORTS 293 n.20 (4th ed. 1971)[27]; *Hickman* v. *Taylor*, 170 F.2d 327 (3d Cir. 1948), *cert. denied*, 336 U.S. 906 (1949).

Another situation involving liability for the acts of another occurs when one person gives the other "substantial assistance or encouragement" to engage in tortious conduct *and* knows that the conduct constitutes a breach of duty. Sec. 876(b). Once again, there must be a close relationship between the tortious conduct and the person held liable albeit not the actor. *See, e.g.*, *Haddock* v. *Stewart*, 232 Md. 139, 192 A.2d 105 (1963) (where two automobiles are racing on the streets and one is involved in an accident, the other driver may be held liable)[28]; *South Shore National Bank* v. *Donner*, 104 N.J. Super. 169, 249 A.2d 25 (1969) (allegation that jeweler furnished a false appraisal with knowledge that it would be used to defraud insurer states a cause of action under Section 876(b) of the Restatement). Again there is no

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[27] The court in *James* said:

> "This is in substance an action on the case in the nature of conspiracy. Being a civil remedy the gist of the action is not the conspiracy charged, but the tort working damage to plaintiff. The tort in its nature was capable of commission either by both defendants jointly or by Freeman alone." 149 F. at 140.

[28] This fact pattern appears as illustration 2 in the ALI's comment on Section 876(a).

liability on the part of one who has neither acted tortiously nor agreed to achieve an unlawful objective.[29]

Finally, the first person is subject to liability if he gives the other "substantial assistance" in accomplishing the tortious result *and* has himself been guilty of an independent breach of duty to the injured party. Sec. 876(c). Thus, if the person sought to be held liable merely joins in an effort to achieve a lawful objective, that person has committed no breach of duty to a person injured by tortious conduct of another member of the group even if the first person has rendered "substantial asistance" to the actor. Liability cannot be imposed.

In short, there is ample authority, expressed in Section 876, for imposing tort liability on those who truly ought to be liable without impairing the First Amendment rights of those whose relationship is more distant. There is no demonstrated need for the broad-scale liability without fault that is imposed under the conspiracy doctrine followed by the Mississippi Supreme Court in this case. Reliance on Section 876 concepts is clearly a "less drastic means" for dealing with the subject of legitimate concern—preventing violence. *Cf. Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

We urge the Court, therefore, to hold that a civil rights boycott may not be the subject of a suit for damages or injunctive relief under the conspiracy doctrine or any similar theory.[30]

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[29] There may well be situations in which mere "encouragement" to commit a tort would not suffice for the imposition of liability, and certainly criminal liability should be imposed only when there is a clear and present danger that violence or other unlawful conduct will occur. *E.g.*, Yates v. United States, 354 U.S. 298 (1957).

[30] The Court is free to delimit the power of the states to apply common law causes of action to conduct protected by the First Amendment. The Court took just such a step in New York Times v. Sullivan, 376 U.S. 254 (1964), where it forbade libel actions by public officials absent proof of actual malice.

IV. Limiting the Power of A State To Suppress Civil Rights Boycotts Is Not Inconsistent With the Principle That Federal Civil Rights Laws and Remedies Should Be Broadly Construed.

We have here urged that the Court limit the power of states to suppress civil rights boycotts. It may be thought that there is an inconsistency between this position and the decision under review in *General Building Contractors Association* v. *Pennsylvania*, No. 81-280, and related cases.[31] In that case the lower court found that a union hiring hall was operated in a racially discriminatory fashion. Employees had been referred to the defendant employers exclusively through the discriminatory hiring hall pursuant to a series of collective bargaining agreements negotiated by several trade groups as agents of the employers. The court found that the employers and the trade groups did not participate in the hiring hall operation and neither knew nor had reason to know of the discriminatory conduct. The court's decree, designed to eliminate the discrimination and ameliorate its present effects, imposes certain obligations not only on the union but also on the employers and trade groups. (No back pay liability has been assessed in the case.) The trade groups contend that no obligations should have been imposed upon them by the court's decree.

The decision in *General Building Contractors* rests on the proposition that federal civil rights laws should be construed broadly to accomplish their purposes and that remedies thereunder should be broadly applied. There is no inconsistency between the position advanced in this case and the rationale of *General Building Contractors*. The reason is apparent: Suppression of civil rights boy-

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[31] *General Bldg. Contractors* and this case have been set down for oral argument in tandem. 50 U.S.L.W. 3375 (Nov. 10, 1981).

cotts by sweeping injunctions and damages awards is contrary to several extremely important constitutional principles; broad construction of civil rights laws and remedies is not, and indeed it furthers the nation's historical commitment to end invidious discrimination.

Federal laws protecting constitutional rights, especially the Civil Rights Acts that were enacted following the Civil War, have consistently been accorded a broad interpretation. *See, e.g., Gomez* v. *Toledo*, 446 U.S. 635, 639 (1980): "as remedial legislation" a Civil Rights Act "is to be construed generously to further its primary purpose." This broad interpretation of the Civil Rights Acts also extends to the scope of relief that must be granted to those whose civil rights have been infringed. *See, e.g., Louisiana* v. *United States*, 380 U.S. 145, 154 (1965): "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Altogether different presumptions apply in a case like this one, involving laws and decrees affect First Amendment rights. There is a preumption against prior restraints upon expression, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). "Broad prophylactic rules . . . are suspect" and "[p]recision of regulation" is required, *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). An order "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll* v. *President* and *Commissioners* of *Princess Anne*, 393 U.S. 175, 183 (1968).

Thus, while the Court has held that "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means

of serving a compelling state interest," *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 540 (1980), the Court has also reasoned that "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, . . . from which § 1982 was derived."[32] *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237 (1969).

Petitioners in *General Building Contractors* appear to make no claim that their conduct was protected by the First Amendment or that the injunction of which they complain infringed First Amendment rights. Instead, their contention is one of statutory construction. They argue that the lower court's construction of 42 U.S.C. § 1981 was too broad. But many statutes are construed broadly, while many others are construed narrowly; there is no "inconsistency" between these two situations, for every rule of law must be construed in light of the principles pertinent to that rule. The principle for which we contend here is not pertinent to the question presented in *General Building Contractors*.

In short, *Claiborne Hardware* and *General Building Contractors* must be resolved under contrasting lines of precedents: the former, under a series of decisions narrowly circumscribing governmental inhibitions upon constitutionally protected activity; the latter, under the decisions requiring a broad interpretation of civil rights statutes and imposition of broad remedial action to counter invidious discrimination.

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[32] The Civil Rights Act of 1866 was also the source of 42 U.S.C. § 1981, the precise statute involved in *General Bldg. Contractors*.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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December 24, 1981